Supreme Court of the United States.

No. 174.—October Term, 1905.

The Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company, Plaintiff in Error, vs. George W. Bay and William Bay.	In Error to the Supreme Court of the State of Ohio.

[January 2, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action upon a contract, brought by the defendants in error to recover an instalment of money due by its terms. A judgment in their favor was sustained by the Supreme Court of the State, although the petition in error to that court set up that the contract was illegal under the Act of Congress of July 2, 1890, c. 647, (26 Stat. 209.) No opinion was delivered, but a certificate that this objection was relied upon and that it necessarily was considered was made part of the record by that Court. Therefore the present writ of error properly was allowed. The record shows that the question was raised and the certificate shows that it was not treated as having been raised too late under the local procedure, a point upon which the State Court is the judge. It is enough that the Federal question was raised and necessarily decided by the highest Court of the State. *Farmers' & Merchants' Insurance Co.* v. *Dobney*, 189 U. S. 301.

The contract was an indenture between the Portsmouth and Pomeroy Packet Company, George W. and William Bay, of the first part, and the Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company, of the second part. By this instrument the parties of the first part sell to the latter two steamers, two deck barges, two coal flats and five hundred dollars in the stock of the Coney Island Wharf Boat Company, for $30,500, to be paid as therein provided. The party of the second part also agrees to pay to the Bays $3,600 annually in advance for five years, provided, however, that in case of opposition to its boats by other boats running from Cincinnati to Portsmouth, Ohio, or to points above Portsmouth, not including points above Syracuse, Ohio, causing it to carry freight and passengers at certain exceedingly low rates, the time of payment of the instalments shall be postponed until the opposition has ceased. It is further agreed that if the opposition continues for two years without interruption, and no annual payment be made, the Bays may cancel the agreement.

"It is also agreed as a part of the consideration of this agreement" that for five years the parties of the first part, or either of them, shall not be "engaged in running or in operating, or in any way be interested in any freight and passenger packet or business, or either of them, at and from Cincinnati, Ohio, to Portsmouth, Ohio, and intermediate points; nor at and from Portsmouth, Ohio, to Cincinnati, Ohio, and intermediate points; nor at and from Syracuse, Ohio, or points between Syracuse and Portsmouth, Ohio, to or for points below Portsmouth, Ohio," with a qualification as to the towing and barge business, so long as it does not interfere with the other party's freight and passenger business from Portsmouth to Cincinnati. "It is also understood in this agreement that the party of the second part will maintain the rates charged by the parties of the first part on business above Portsmouth, Ohio, said rates, however, never to exceed railroad rates between said points." The last mentioned covenants, set forth in this paragraph, are especially relied upon as making the contract illegal as in restraint of trade. The previously mentioned suspension of instalments in case of opposition rising to a certain height also is referred to as a combination to aid the purchaser in getting a monopoly of river trade between Portsmouth and Cincinnati, including, it is said, some Kentucky ports.

It might be enough, perhaps, to answer the whole contention, that it does not appear on the record that the contract necessarily contemplated commerce between the States. It would be an extravagant consequence to draw from *Hanley* v. *Kansas City Southern Ry.*, 187 U. S. 617, a case of a State attempting to fix rates over a railroad route passing outside its limits, that the contract was within the Sherman act because the boats referred to might sail over soil belonging to Kentucky in passing between two Ohio points. It may be noticed further that Ohio equally has jurisdiction on the river. *Wedding* v. *Meyler*, 192 U. S. 573. A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts. Technically, perhaps, there might be some trouble in saying that the Supreme Court of Ohio did not decide the case on the ground that the illegality was not made out as matter of fact.

But we do not like to put our decision upon technical reasoning where there is at least a fair surmise that such reasoning does not meet the realities of the case. We will suppose then that the contract does not leave commerce among the States untouched. But even on this supposition it is manifest that interference with such commerce is insignificant and incidental, and not the dominant purpose of the contract, if it actually was thought of at all. The route mentioned is between Ohio ports. The contract, in what it especially contemplates, is a domestic contract and, so far as it is so, is shown to be valid under the local law by the decision of the Ohio court. The chief and visible object of its provisions has nothing to

do with commerce among the States. That which suspends payment of instalments in case of very serious opposition is security against a losing bargain, not a combination to gain a monopoly. The withdrawal of the vendors from opposition for five years is the ordinary incident of the sale of a business and good will.

It is argued, to be sure, that the last mentioned covenant is independent and not connected with the sale of the vessels. The contrary is manifest as a matter of good sense, and is proved even technically by the words "it is also agreed as a part of the consideration of this agreement." By these words the covenant not to do business between Cincinnati and Portsmouth for five years is imported into the sale of the ships, and made one of the conventional inducements of the purchase. The price is paid not for the vessels alone but for the vessels with the covenant. So, still more clearly, the parallel instalments for five years are paid for the covenant, at least in part. It is said that there is no sale of good will. But the covenant makes the sale. Presumably all that there was to sell, beside certain instruments of competition, was the competition itself, and the purchasers did not want the vendors' names.

This being our view of the covenant in question, whatever differences of opinion there may have been with regard to the scope of the Act of July 2, 1890, there has been no intimation from any one, we believe, that such a contract, made as part of the sale of a business and not as a device to control commerce, would fall within the act. On the contrary, it has been suggested repeatedly that such a contract is not within the letter or spirit of the statute, *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 329, *United States* v. *Joint Traffic Association*, 171 U. S. 505, 568, and it was so decided in the case of a patent. *E. Bement & Sons* v. *National Harrow Co.*, 186 U. S. 70, 92. It would accomplish no public purpose, but simply would provide a loophole of escape to persons inclined to elude performance of their undertakings, if the sale of a business and temporary withdrawal of the seller necessary in order to give the sale effect were to be declared illegal in every case where a nice scrutiny could discover that the covenant possibly might reach beyond the State line. We are of opinion that the agreement before us is not made illegal by either of the provisions thus far discussed.

It only remains to say a word as to the agreement to maintain rates. This is a covenant by the purchaser, the plaintiff in error. It is not the covenant sued upon. It is not declared to enter into the consideration of the sale. If necessary, we should be astute to avoid allowing a party to escape from his just and substantially legal undertaking on such a ground. The argument on the other side requires us to import a subordinate undertaking of the buyer into the consideration for that which was the considera-

tion of his debt and, in that round about way, to make the debt unlawful. We shall not go into such niceties beyond noticing that they are not encouraged by the cases. *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64. *Bank of Australasia* v. *Breillat*, 6 Moore, P. C., 152, 201. *Pigot's Case*, 11 Co. Rep. 26*b*, 27*b*. The plaintiff in error did business between Cincinnati and Syracuse, Ohio, and the rates referred to must be assumed to be rates within those points. If the covenant had any indirect bearing on commerce with another State, what we have said sufficiently explains why we deem it insufficient to make the whole agreement void.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.